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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 199

ELMER MICHAEL WALSH, SHERIFF, COOK COUNTY, ILLINOIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ex rel RALPH E. WHITE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN S. BOYLE,
State's Attorney of Cook County, Illinois,
Attorney for Petitioner.

JOHN T. GALLAGHER,
JAMES V. CUNNINGHAM,
PETER G. KUH,
Assistant State's Attorneys,
Of Counsel.

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Elmer M. Walsh, Sheriff, Cook County, Illinois, Petitioner, by John S. Boyle, State's Attorney of Cook County, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on April 20, 1949.

Record and Opinion Below.

This cause was heard in both the District Court and the Court of Appeals. The District Court stated its opinion (R. 384-394). The opinion of the Court of Appeals, delivered by a divided court is reported at 174 F. 2d 49 (R. 426-444).

Jurisdiction.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 20, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. Secs. 1254, 2101.

Summary Statement.

The petitioner below, here the respondent-appellee, was held in contempt by the Superior Court of Cook County, Illinois on June 1, 1945, after he had failed to comply with a mandamus order originating in the same court. The mandamus order was one to compel White to put on the ballot of the Municipal Election to be held in Lyons, Illinois on April 17, 1949, the Regular Peoples Party. The order was entered after a hearing and a finding by the Superior Court that it had jurisdiction of the parties and the subject matter, and a finding of the issues in favor of the petitioners for mandamus. After respondent in the mandamus action refused to comply with order therein a contempt judgment was entered on May 31, 1945. Appeal was taken from this order to the Appellate Court of Illinois, First District, which affirmed the lower court's judgment (R. 317-327, 342-343) reported at 329 Ill. App. 81 and 94. Thereafter the Illinois Supreme Court denied leave to appeal and the United States Supreme Court denied applications for certiorari (R. 11, 347).

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Subsequently a writ of habeas corpus was sued out in the Circuit Court of Cook County which was subsequently quashed and a writ of habeas corpus or, in the alternative a motion for a writ of mandamus to expunge the mandamus judgment of the Superior Court of Cook County was denied by the Supreme Court of Illinois (R. 12). A motion in the nature of a writ of error coram nobis was then filed in the Superior Court of Cook County and it was denied on December 19, 1947 (R. 13). No appeal was taken by petitioner-appellee from either the habeas corpus proceeding in the Circuit Court of Cook County or the Supreme Court of Illinois, or from the Superior Court motion in the nature of a writ of error coram nobis. On the same day as the denial of the writ of error coram nobis this proceeding for habeas corpus was initiated by the petitioner-appellee in the United States District Court, said writ being based generally on the grounds that petitioner was being illegally detained in violation of the requirements of due process of law embodied in the Fifth and Fourteenth Amendments to the United States Constitution.

In his petition for habeas corpus appellee stated that he was duly elected, qualified and acting Village Clerk of the Village of Lyons, Illinois, that the Superior Court had no jurisdiction to pass on the issues therein presented in the mandamus proceeding, that the mandamus proceeding was an interference by the judiciary with the Executive branch of the State Government. He further alleged that a census had been adopted by resolution in the Village of Lyons showing the population of the Village to be over 5,000. All of the above contentions except the last had been passed upon and denied in the hearing on the mandamus petition. The last was a piece of evidence which was never presented before the State Courts except in the motion in the nature of a writ of error coram nobis, where it had been passed on and denied.

A hearing was held by the District Court on the petition, which after re-opening the case and permitting new evidence to be admitted found for the petitioner. The United States Court of Appeals for the Seventh Circuit affirmed the District Court by a 2-1 decision.

Questions Presented.

1. Whether a United States District Court has jurisdiction to entertain a Petition for a Writ of Habeas Corpus, or to try the issues tendered thereby where the relator waived his right to try these issues in the State Court by the manner of appeal taken; where certiorari was denied by the United States Supreme Court; where the only questions involved were matters of interpretation of state law; where the relator failed to raise any Federal question in State Court proceedings; where State Court remedies were not exhausted; and where evidence is offered which was not adduced at the original trial?

2. Whether the District Court could properly rule that neither the Circuit nor Superior Courts of Cook County, nor the Appellate Court of Illinois had jurisdiction when these courts had passed on the question?

Constitutional Provision Involved.

"Nor shall any state deprive any person of life, liberty or property without due process of law" U. S. Const., Amendment XIV, Section 1.

Statement.

Petitioner-appellee was the elected Village Clerk of the Village of Lyons, Illinois. He gave notice as required by statute of the election to be conducted in that village on

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April 17, 1945. Certificates of nomination of two parties, the Regular Peoples Party and the Regular Progressive Citizens Ticket were filed with him. Candidates of both parties had been nominated by caucus, a method of nomination permitted by statute in Illinois in communities whose population is under 5,000. Objections were filed to the nominating papers of the Regular Peoples Party on the ground the village population exceeded 5,000 inhabitants. A Municipal Elections Board, headed by County Judge Jarecki was called to consider the objections. The only evidence presented to the Board was the Federal Census of 1940 showing the population of Lyons to be 4,960. One member of the Board made some reference to OPA figures showing the population to be over 5,000 but there was no further evidence on this point. The day after the meeting of the Board a petition for mandamus was filed in the Circuit Court of Cook County by the Regular Peoples Party against the Chairman of the Election Board stating that under Illinois Statutes the Board lacked jurisdiction, the Board had never served the relator with the objections as required by Illinois Statute, and that White was not in fact the Village Clerk of Lyons, since he had resigned and become Chief of Police of the Village. Mandamus issued, but there was not contempt proceedings following the order since White and another member of the Board had not been personally served. The Regular Peoples Party then filed a petition for a writ of mandamus in the Superior Court of Cook County, wherein personal service was secured on White. Defendants in that suit filed a motion to strike the petition which was denied. White was ordered after a hearing to print ballots and include the Regular Peoples Party thereon. When White failed to obey the order of the Court he was held in contempt and sentenced to six (6) months in the County Jail. Appeal was taken from this

decision to the Appellate Court of Illinois. It is a long standing rule in Illinois that Constitutional questions may be decided only by the Supreme Court of this state, and an appeal to the intermediate Appellate Court waives such questions. Further proceedings were as set out above in the Summary Statement.

Reasons for Granting the Writ.

The District Court lacked jurisdiction to entertain the Petition for the writ of Habeas Corpus, or to try the issues tendered thereby, or to make the writ absolute and discharge the relator.

The United States Supreme Court in *Parker* v. *People of the State of Illinois*, 92 L. Ed 685 held that one who waived a constitutional question according to state practice by taking an appeal from a contempt order to an intermediate court, without jurisdiction to pass upon constitutional questions, upon assignments of error which included matters of which such court had jurisdiction, was foreclosed from a consideration of the questions of constitutionality by the State Court of last resort and may not seek review of the constitutional question by the Supreme Court of the United States. This reasoning of this Court should apply with equal force to the jurisdiction of the Federal District Court to grant a trial de novo on a constitutional issue waived by this method in the State Court wherein additional evidence was admitted in a habeas corpus proceeding.

Though denial of certiorari in the instant case was not a finding on the merits it made the Appellate Court of Illinois decision the law of the case.

The Supreme Court of the United States refused certiorari on the appeal of petitioner-appellee here from the decision of the Appellate Court of Illinois upholding the

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contempt judgment. This Court has repeatedly stated that denial of certiorari is not a decision on the merits, but a recent District Court Opinion where an attempt was made to obtain habeas corpus in the District Court after certiorari had been denied to a State Court conviction, held that the denial of certiorari established the lower court decision as the law of the case. *Ex Parte Danziger*, 77 F. Supp. 466 (D. C. S. D. Cal., 1948).

If the present granting of the writ of habeas corpus is allowed to stand, denial of certiorari by this Court would appear to be an invitation to a reopening of the entire proceeding and the taking of additional evidence on a habeas corpus proceeding in a Federal Court.

There was no Federal Question raised in either the State Courts or the Federal District Court.

The only question before the Municipal Election Board was one of fact, namely the population of the Village of Lyons. The questions before the Superior Court were whether the Election Board was lawfully constituted which was again one of fact and construction of the laws of Illinois, and whether the action of the Electoral Board was so arbitrary as to amount to a fraud.

There is nothing in the District or Circuit Court opinions which indicates that this case may not have been decided on an independent state ground. Such a showing must be affirmatively made to invoke the jurisdiction of the Federal Courts.

White v. *Ragen*, 324 U. S. 760.

This court has repeatedly held that questions arising out of state elections are matters not within the protection of the Fourteenth Amendment to the Federal Constitution, as pointed out in *Snowden* v. *Hughes*, 321 U. S. 1, 6, 7, 11, and 12.

Petitioner-Appelleee has not exhausted his remedies in the State Courts.

Petitioner-appellee filed a writ of habeas corpus in the Circuit Court of Cook County and later in the Supreme Court of Illinois; no appeal was taken from the dismissal of either of these writs. The same is true of the dismissal of the writ of error coram nobis in the Cook County Courts. State remedies must be exhausted before habeas corpus can be sought in the Federal Courts. *Ex parte Hawk*, 321 U. S. 114.

Conclusion.

It is respectfully submitted that the District Court erred in entertaining the petition for the Writ of Habeas Corpus and that the United States Court of Appeals erred in sustaining the granting of the writ. Therefore, for the reasons above given we believe that sound legal principles require that the petitioner-appellee be remanded to the custody of the respondent-appellant and that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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